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IN THE SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, A National Banking Association,
Petitioner

vs.

WALKER BANK & TRUST CO. a corporation,
Respondent

October Term 1965
No. [redacted] 51

BRIEF OF PETITIONER

The First National Bank of Logan

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THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, A National Banking Association,
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vs.

WALKER BANK & TRUST CO. a corporation,
Respondent

October Term 1965

No. 875

BRIEF OF PETITIONER
The First National Bank of Logan

OPINION BELOW

The opinion of the District Court for Northern District of Utah is reported at 234 F. Supp. 74.

The opinion of the Court of Appeals for the Tenth Circuit is reported at 352 F. 2d 90.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit in the above case was made and entered on October 26, 1965. The First National Bank's petition for rehearing was denied on December 3, 1965. The petition for certiorari was filed January 4, 1966 and was granted May 2, 1966.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code, Section 1254 (1). [As to time see 28 U. S. C. Section 2101 (c).]

STATUTES AND FEDERAL RULES INVOLVED

Question No. 1:

United States Code, Title 28:

Section 1331 (p. 5019), 72 Stat. 415:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Rules of Civil Procedure, Rule 12 (h) (p.5138):

(2) that, wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Question No. 2:

United States Code, Title 12:

Section 36 (p.2068), 76 Stat. 667:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely

by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than equal amount of capital stock.

Section 7-3-6, Utah Code Annotated, 1953:

Business conducted at banking house — Branching of offices—Violation of section a misdeameanor. The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

The term "branch" as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may reasonably require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the county in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, state the reasons therefor, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the estab-

lishment of such branch or office designate and limit the character of work and service which may therein be performed.

No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.

Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

QUESTIONS PRESENTED

Respondent, Walker Bank and Trust Company, of Salt Lake City, Utah, brought action to have the Certificate of Authority granted by the Comptroller of the Currency to The First National Bank of Logan to operate a branch in Logan, Utah, declared illegal because The First National Bank did not take over an existing unit bank in establishing its branch (even though there was no other unit bank in Logan, Utah, The First National Bank could take over) as provided in the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953, which provision Walker Bank claims is incorporated in Title 12, United States Code, Section 36 (c). Walker Bank also seeks an injunction enjoining The First National Bank from continuing to operate its branch. Walker Bank alleged it would be irreparably injured and damaged in excess of $10,000 if the injunction was not issued, which allegations were denied by the defendants. Walker Bank presented no evidence to the District Court that it had been or would be damaged by the continued operation of the branch. The District Court nevertheless denied The First National Bank's motion to dismiss because of failure to show jurisdiction as there was no showing that the amount in controversy exceeded $10,000, but the District Court did dismiss the complaint of Walker Bank on the grounds that the Comptroller was within his statutory

authority in authorizing the branch. On appeal to The Court of Appeals for the Tenth Circuit, the decision of the District Court was reversed on the merits, but was silent as to the question of jurisdiction raised by The First National Bank. The questions presented are:

1. *Does a Federal District Court have jurisdiction to hear a complaint by a state bank that a national bank's intra-city branch was illegally established and asking that its continued operation be enjoined where there was no showing that the amount in controversy exceeded $10,000 as the state bank presented no evidence that there was or would be damage to the state bank's business by the continued operation of the national bank's branch, and the defendant national bank's pleading denied that the state bank would be damaged?*

If the question is answered in the negative the second question need not be answered. If it is answered in the affirmative then the following question remains:

2. *Whether Congress in the National Banking Act, 12 U. S. C. Section 36 (c) intended that national banks are subject to the identical restrictions of state law as state banks in establishing a branch within the limits of their own community?*

STATEMENT OF THE CASE

Defendant, The First National Bank of 99 North Main Street, Logan, Utah, applied to the Comptroller of the Currency for permission to establish a branch at 466 North Main Street in Logan, Utah, on November 9, 1962. Prior to that time the defendant bank had no branch. The defendant bank did not seek to take over an existing bank because there was no other bank, other than branches, situated in Logan. The plaintiff, Walker Bank & Trust Company of Salt Lake City,

Utah, a state bank, and The First Security Bank of Utah, of Ogden, Utah, a national bank were at the time and are now operating branches in Logan, Utah (R. 13).

The Comptroller requested John Wanless, Jr., a national bank examiner, to investigate defendant bank's application and in the course of his investigation between November 27 and 29, 1962, he advised Reed Holt, President of Walker Bank, the plaintiff, of the application (R. 17). But Walker Bank took no action thereon. The Comptroller approved the application on January 17, 1963, and on January 21, 1963, the Comptroller issued his certificate of authority granting permission to The First National Bank to establish a branch bank on North Main Street in Logan, Utah (R. 13). On the same day The First National Bank established a branch and it has continued to operate since said time.

On July 9, 1963, plaintiff, Walker Bank, commenced this action and asked for a judgment declaring that the authorization of the Comptroller for a branch was prohibited by Title 12, United States Code, Section 36 (c) and for an order compelling the Comptroller to rescind the certificate and restraining the defendant bank from establishing or operating a branch bank in the City of Logan. The plaintiff claimed that even though Utah's law authorizes branch banking, the defendant national bank had not taken over another bank as provided by state law, even though there was no other unit bank in Logan The First National Bank could take over (R. 1-4).

Walker Bank alleged in its complaint the basis for jurisdiction of the Federal District Court as required by Rule 8 (a) (1) of the Rules of Civil Procedure, Title 28, United States Code as follows:

> "This action arises under Section 36 of Title 12 of the United States Code commonly referred to as the National

Banking Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah and in the said City of Logan where it has a large investment in capital, property, equipment and good will and irreparable damage will be sustained by plaintiff unless the relief herein prayed for is granted. The amount in controversy exceeds, exclusive of interest and costs the sum of $10,000" (R. 1-2).

In paragraphs 1 and 7 of its third defense the defendant First National Bank denied the allegation above set forth and in said paragraph 1 not only denied that Walker Bank would be damaged but alleged that it would be benefited by defendant bank's branch:

> "This defendant denies that irreparable damages will be sustained by plaintiff unless said relief is granted and alleges that no damage will be sustained by plaintiff, in fact, under a National Emergency plaintiff may be benefitted by the establishment of a new branch bank of this defendant as authorized by the Comptroller of the Currency" (R. 6-8).

On April 24, 1964, the parties entered into a stipulation of facts and other matters which contained no fact showing that Walker Bank has been or would be damaged by The First National Bank's branch. The parties did agree as follows:

> "At the time of the commencement of this action Plaintiff had demand and time deposits at its Cache Valley Branch in Logan, amounting to in excess of $10,000,000; it had outstanding loans in excess of $5,000,000 which has been made at said Cache Valley Branch; and it had an investment in furniture and fixtures and leasehold improvements at the Cache Valley Branch in excess of $50,000" (R. 12-13).

The parties also agreed that "each of the parties hereto reserves the right to offer evidence at the trial of this case

with respect to any issue of fact under the pleadings in this case which has not been resolved by the stipulation of facts hereinabove set forth, provided that:

> "The party intending to offer such evidence shall give written notice thereof to the other parties within thirty days from the date hereof . . " (R. 14).

Walker Bank gave no notice that it intended to offer any additional evidence at any time prior to trial and offered no evidence at trial. The First National Bank gave notice that it intended to offer evidence and thereafter the parties stipulated as to such evidence (R. 16-33).

In the second stipulation dated June 18, 1964, the parties stipulated that if Ronald S. Hanson were called to testify he would show that The First National Bank was agent for the Federal Reserve Bank to act for it in the event of emergency, and the branch bank would contain a large safe to permit The First National Bank to have the additional vault space necessary to act as such agent thus relieving the Walker Bank of the necessity of storing additional cash and currency in the event of a national emergency (R. 18).

On June 30, 1964, the parties stipulated that:

> "The case is hereby submitted to the court for its decision on the merits upon the facts stipulated to by the parties and set forth in the Stipulation of Facts and Other Matters, dated April 24, 1964, and filed herein and the Stipulation between plaintiff and the defendant, The First National Bank of Logan, dated June 18, 1964, and filed herein . . " (R. 35).

At the hearing before the trial court on September 15, 1964, the defendant First National Bank moved to dismiss on the grounds of lack of jurisdiction which motion was denied without opinion by the trial court (R. 36). In its Memo-

randum Decision of September 30, 1964, and in its Judgment of October 9, 1964, the trial court made no finding of facts relating to jurisdiction and made no conclusions that it has jurisdiction (R. 37-46). The trial court found that the Comptroller acted within his authority in issuing a certificate to The First National Bank authorizing a branch in Logan, Utah, and dismissed plaintiff's complaint. Walker Bank appealed the decision. The First National Bank did not cross-appeal but in its brief asked the United States Court of Appeals for the Tenth Circuit to sustain the dismissal of the complaint on the grounds that the District Court lacked jurisdiction because the amount in controversy alleged by the plaintiff had not been proved.

On October 26, 1964, the United States Court of Appeals for the Tenth Circuit entered its decision reversing the trial court and remanding the case to the District Court for a decision on The First National Bank's affirmative defenses relating to standing to sue, laches, and constitutionality of the Utah Statute. The decision of the Court of Appeals was silent as to whether the District Court was correct in denying the motion to dismiss on the grounds of lack of jurisdiction and there is nothing in the decision which specifically finds that the District Court had jurisdiction or whether the facts as stipulated by the parties show an amount in controversy in excess of $10,000.

The First National Bank's petition for rehearing on the grounds the District Court lacked jurisdiction was denied by the Court of Appeals without opinion on December 3, 1965 (R. 57-58).

SUMMARY OF ARGUMENT

Point I: The decision of the District Court dismissing Plaintiff's complaint can be affirmed and the opinion of the

Court of Appeals (Tenth Circuit) reversed on the grounds that the District Court lacked jurisdiction to hear plaintiff's complaint. Plaintiff claimed jurisdiction under 28 U. S. C. Section 1331, as the matter arises under the laws of United States and also claimed the jurisdictional amount of $10,000 was present. The amount in controversy allegation was denied by the defendants. Plaintiff presented no evidence showing it had been nor that it would be damaged by the operation of defendant's branch, but defendant presented evidence that plaintiff, in fact, was benefited by defendant's branch. The United States Supreme Court has held in KVOS v. Associated Press (1936) 299 U. S. 269, 57 S. Ct. 197, 81 L. ed. 183, and in McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135, that the plaintiff has the burden of showing damage to the plaintiff in excess of the statutory amount where the defendant denies the allegations of jurisdictional amount in his answer. The proof of the value or amount of plaintiff's business is not sufficient to show the amount in controversy. If the United States Supreme Court has held that plaintiff's failure to show damage requires dismissal of the complaint, *a fortiori* where the plaintiff shows no damage and the defendant shows a benefit to the plaintiff, the District Court lacks jurisdiction to hear plaintiff's complaint.

Point II: The District Court was correct and the Court of Appeals (Tenth Circuit) should be reversed as the Comptroller has authority to permit a national bank to branch in its own city where state law authorizes state banks to branch in that city. A national bank is a Federal agency and is subject to state restrictions only to the extent Congress has specified. The plain language of 12 U. S. C. Section 36 (c) (1) contains no restriction on National banks seeking to branch in their own cities other than express authority to branch in that city must be allowed by state law and the Comptroller must approve the

proposed branch. Utah law expressly authorizes state banks to branch in Logan under the provisions of the second paragraph of Section 7-3-6, Utah Code Annotated, 1953, and the Comptroller has authorized The First National Bank's branch so it is a lawful branch. The fact that plaintiff Walker Bank has established a branch in Logan also shows that state law expressly authorizes branch banks in Logan. In subdivision (2) of 12 U. S. C. Section 36 (c) which relates to national banks seeking to branch outside the city where they are located, Congress provided they must comply with location and capital restrictions of state law. The failure of Congress to include such restrictions in subdivision (1) indicates no restrictions were intended other than the written provision that state law must authorize branch banking in that city. This reasoning finds support in language used elsewhere on other banking matters by Congress which specifically imposes "identical" restrictions on national banks as state law imposes on state banks. But in authorizing establishment of branches within the city where the main bank is located Congress expressly provides for different capital requirements than those imposed by state law indicating that identical requirements are not intended. If Congress had intended the requirements of Federal law and state law to be identical, Congress would have used specific language so providing.

Point III: The legislative history of 12 U. S. C. Section 36 (c) (1) shows it was enacted to allow national banks to compete with state banks allowed to branch in the city where they were located and not to prevent them from competing as would be in the case if the decision of the Court of Appeals (Tenth Circuit) were upheld. In 1922 the Comptroller of the Currency authorized national banks to open teller windows in their own community. But in 1924 the United States Supreme Court said this was not authorized. The Comptroller went to Congress because he feared national banks would convert to

state banks if they could not open teller windows to serve their customers in their own community. In the McFadden Act of 1927 [the statute now appears in 12 U. S. C. Section 36 (c) (1)] Congress authorized national banks to branch within their own communities if state banks were permitted to branch. This law was enacted to permit national banks to branch if state banks are allowed to branch, but under the decision of the Court of Appeals (Tenth Circuit), a state can impose restrictions on a national bank with which it cannot comply (and thus prevent it from branching), but which restrictions are possible for every other bank in the state to meet, thus defeating the purpose of the Act of Congress. The Court of Appeals (Tenth Circuit) quotes language showing that the purpose of the McFadden Act was to put national banks more nearly on a par with state banks, but the decision of the Court of Appeals ignores this language in stating that national banks are subject to all restrictions of state law in establishing a branch. Imposing the requirements of state law in addition to the requirements of the authorized agent of Congress, the Comptroller of the Currency, places national banks under a double burden of procedural requirements and gives a substantial competitive advantage to state banks contrary to the cited purposes of the Federal branch banking law. The actions of Congress in writing 12 U. S. C. Section 36 (c) in rejecting the Bratton amendment as written, which imposed identical restrictions on outside and inside branches, and in not adopting the Vandenburg amendment, restricting branching to merger situations, and in writing two subdivisions (one for inside community branches containing no specific restrictions of state law and one for outside branches containing specific restrictions of state law), strongly indicates that Congress intended no additional restrictions on the authority to establish branches within the city where the main bank is located. The decision of the Court of Appeals (Tenth Circuit) makes subdivision (1) pertaining to inside branches inoperative or superfluous

even though there is a strong presumption against such an interpretation.

Point IV: This is a case of first impression. The decisions of lower courts holding that national banks seeking to branch outside the community where they are located are subject to the same location restrictions as state banks should not be cited as precedents here. Location restrictions are specifically included under subdivision (2) of 12 U. S. C. Section 36 (c) because Congress so provided. Congress did not include any location or any other restriction of state law in subdivision (1) of the statute and since state banks are expressly authorized to branch in Logan Utah, the Comptroller can authorize the only national bank located in Logan, Utah, to branch there.

ARGUMENT

Point I.

THE DISTRICT COURT LACKED JURISDICTION BECAUSE THE PLAINTIFF DID NOT PROVE THAT IT WOULD SUSTAIN ANY DAMAGE BY REASON OF THE OPERATION OF DEFENDANT BANK'S BRANCH AND THE DEFENDANT BANK SHOWED THAT THE PLAINTIFF IN FACT MAY BE BENEFITTED BY THE DEFENDANT BANK'S BRANCH.

The plaintiff is required to include in its complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." (See Rule 8 (a) Rules of Civil Procedure Title 28, U. S. C.) The plaintiff purported to comply with this requirement by stating that the action involved a Federal Statute, the plaintiff would suffer irreparable damage if the relief was not granted, and that the amount in controversy exceeded $10,000. The apparent intent of these allegations was to show that the District Court had jurisdiction under 28 U. S. C. Section 1331.

A. Objection to Jurisdiction is Available at any time in the Trial Court and the Appellate Court and cannot be Waived.

Both defendants denied that the plaintiff would suffer irreparable damage if the relief was not granted and denied that the amount in controversy exceeded $10,000. The defendant First National Bank specifically denied that the plaintiff would be damaged at all by the operation of defendant's branch (R. 6-9). No motion to dismiss was made prior to the hearing on the merits since the defendants were willing that plaintiff have every opportunity to show that it had been damaged or would be damaged by defendant's branch. (It should be understood that had any evidence of damage been offered the defendant bank was prepared to show that plaintiff is the second largest bank in the state of Utah, with 13 branches and resources in excess of $240,000,000 and is a member of a multi-state banking chain with deposits in excess of $6,000,000,000 and having some 447 banking offices throughout eleven western states and that the plaintiff was reporting a continuing favorable profit picture, so there would be no proof of damage to plaintiff by the operation of The First National Bank's branch in Logan. The First National Bank is a small unit bank with assets of $12,000,000 and only two places of business, its main office and its drive-in branch in Logan, Utah.)

At the time set for hearing on September 15, 1965, the parties had stipulated that all the evidence was before the Court (R. 35). Since the plaintiff had made no motion that it wished to re-open and offer additional evidence the defendant bank moved that the complaint be dismissed as Walker Bank had not shown that it had been nor would be damaged by defendant's branch and the only evidence pertaining to the issue of plaintiff's damages was that the plaintiff would be

benefited by defendant's branch. In denying defendants motion to dismiss for lack of jurisdiction the District Court found no fact showing damage. Since the defendants obtained dismissal of the complaint in the lower court on other grounds there appeared to be no necessity for a cross-appeal, and the defendant bank followed what seemed to be the law with regard to raising questions of jurisdiction and in its brief suggested to the United States Court of Appeals that there was no jurisdiction in this case. (See Rule 12 (h) (2), Rules of Civil Procedure, Title 28, United States Code.)

As stated in 54 Am. Jur. United States Courts, Section 137, p. 768, the objection to jurisdiction of Federal Courts can be raised at any time:

> "The objection is available at any time both in the trial court and in the appellate court, and cannot be waived. The statute does not however, prescribe any particular mode in which the question of jurisdiction is to be brought to the attention of the court, or how, when raised, it is to be determined. It may be raised by answer or by motion, or in any other manner sufficient to direct the attention of the court to the want of jurisdiction."

An objection to jurisdiction has even been raised in a petition for rehearing. [See Provenzano v. Porter, (9th Cir. 1946) 159 F. 2d 47, cert, den. 67 S. Ct. 1303)]

See also the annotation in 30 A. L. R. 2d at pages 614-615 in which the policy of strict construction of the statutes giving Federal Courts jurisdiction is discussed and cases are cited which support the rule that the questions of jurisdiction can be raised at any time.

B. The Burden is on the Plaintiff to Plead Facts which show Jurisdiction and to Prove such Facts when Challenged by the Defendant's Pleadings.

The overwhelming majority of courts have stated that the plaintiff in order to obtain jurisdiction of a Federal Court for the purpose of having an injunction issue must show that the plaintiff has a right which will be damaged in excess of $10,000 if the defendant continues its present practices. (See Annotation in 30 A. L. R. 2d p. 602). Two cases decided by the United States Supreme Court are similar to the fact situation here.

The first case of KVOS v. Associated Press (1936) 299 U. S. 269, 57 S. Ct. 197, 81 L. ed. 183, involved an action by the Associated Press against a radio station to enjoin it from pirating news broadcast items gathered by the Associated Press and distributed to its members. The complaint alleged:

> " . . the damage to which complainant is being subjected . . is in excess of the sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum . .
>
> " . and the continuance by (KVOS) of its practice will increasingly cause irreparable injury and damage to the (Associated Press) because the effort and expenditures to gather and obtain news will be rendered largely without reward or value so far as concerns the territory served by petitioner's station."

It will be noted that the allegations of Associated Press go further than the allegations of Walker Bank and give a reason for the irreparable damage while Walker Bank merely alleged the jurisdictional amount and irreparable injury.

KVOS filed a motion to dismiss on the grounds that "complainant has not lost any amount and never will lose any amount by reason of this controversy" which is virtually identical to The First National Bank's defense that the Walker Bank

has not been and will not be damaged by its branch. But The First National Bank went further and alleged that its branch may even be a benefit to Walker Bank.

In the KVOS case the Supreme Court said the District Court found as follows:

> " . .the amount in controversy herein, by reason of the defendant's (KVOS) motion to dismiss, must be construed to be in excess of $3000.00 exclusive of interest and costs (and) found the facts as to the business and conduct of the parties substantially as alleged in the complaint."

As conclusions of law the Supreme Court said the District Court found as follows:

> " . . that (the court) had jurisdiction of the parties and the subject matter . . (that) the acts of (KVOS) did not amount to unfair competition . . and did not violate their property rights."

The District Court in the KVOS case dismissed the complaint on its merits.

The Utah District Court also denied the defendants' motion to dismiss on the grounds of lack of jurisdiction and since it did not make any findings that Walker Bank had been or would be damaged by defendant's branch, the court must have construed the defendants' motion to dismiss as requiring it to conclude that the amount in controversy must be over the jurisdictional amount as did the District Court in the KVOS case. The District Court also found on the merits as did the District Court in the KVOS case that no injunction should issue but that plaintiff's complaint should be dismissed.

In the KVOS case the Circuit Court of Appeals reversed the District Court on the merits, but found jurisdiction from

the following facts quoted by the United States Supreme Court in its opinion:

> "The several millions of dollars here alleged to be invested in the Association's business may well be damaged to the extent of $3,000 by the pirating practices described."

The premise that a Federal Court could assume that a plaintiff would suffer damages because of its large investment where it alleged illegal action by a competitor was rejected by the United States Supreme Court when it said:

> " . .we hold that in the circumstances the respondent (plaintiff, Associated Press) had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it . .
>
> " . . The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars . .
>
> " . But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof.
>
> " . . Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such

withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill.

"The Circuit Court of Appeals sustained the District Court's jurisdiction on the ground that the findings upon that point (jurisdiction) was not without support, and the appellate tribunal could not say it was wrong, in view of the magnitude of the respondent's operations and expenditures. . these factors are irrevalent upon the issue of the value of the right for which protection is here sought."

Here Walker Bank had the burden of showing the case was within the District Court's jurisdiction and failed to sustain that burden. Even though it is not alleged (which makes this case even weaker than the argument used by Associated Press in the KVOS case) we assume that the right for which Walker Bank's suit seeks protection is that it should be free to conduct its branch operations in Logan without interference by The First National Bank's branch. But as in the KVOS case no facts are pleaded or proved which show the value of that right. The general allegations of damage and injury were challenged by The First National Bank in its answer. The United States Supreme Court said that in such case the plaintiff must support them by competent proof. Even though Walker Bank did not allege it would lose customers and business if The First National Bank's branch continued operations, if we assume that it intended such allegation to be included in its "irreparable injury" allegation, the United States Supreme Court said this is insufficient because "no intimation is given of the character or extent of the damage they would suffer by such withdrawal" or loss of customers. Walker Bank said it had a large investment and does a large business in Logan, but the United States Supreme Court held that these matters are "irrevalent upon the issue of the value of the right for which protection is here sought."

In such case the Supreme Court held in the KVOS case:

> "Since the allegation as to the amount in controversy was challenged in an appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed."

See also Skelley Oil Company v. Phillips Petroleum Co. (1950) 339 U. S. 667, 70 S. Ct. 876, 94 L. ed. 1194 and Davis v. American Foundry Equipment Company, 94 F. 2d 441, 115 A. L. R. 1486 (7th Cir.) holding that the Declaratory Judgments act did not change the jurisdictional requirements for suits in Federal Courts.

The second case of McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 80 L. ed. 1135, 56 S. Ct. 780, involved an action by General Motors to enjoin the enforcement of a statute dealing with installment sales. The District Court granted an injunction and the case went to the United States Supreme Court on direct appeal. The Court said:

> "The question arises whether the matter in controversy exceeds the sum or value of $3,000 . . so as to give the District Court jurisdiction . . The complaint alleged that the requisite amount was involved and this allegation was denied by the answer."

The identical situation is involved here where Walker Bank's allegation was denied by the defendants. The Court went on to say:

> "Respondent points to the allegations of its bill that the net worth of its business exceeds $50,000; that in 1934 it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000 . . "

Here it was stipulated that Walker Bank has an investment in Logan in excess of $50,000 in buildings and fixtures and that it has outstanding loans of $5,000,000. The facts as to jurisdiction are almost identical. The Supreme Court said:

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference . . But in the instant cast the statute does not attempt to prevent respondent from conducting its business."

The authorization to the First National Bank to operate a branch does not attempt to prevent Walker Bank from conducting its business through its branch in Logan, Utah. The Court concludes:

"The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulations. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegations as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Here the value of Walker Bank's business is not involved save to the extent that it may be affected by the operation of defendant bank's branch. The value of that right may be measured by the loss, if any, that follows from defendant's branch operation. The allegations of Walker Bank's complaint throw no light upon that subject. There were no facts alleged showing what, if any, curtailment of business and consequent loss the operation of the branch would involve. The complaint is thus destitute of any appropriate allegation as to jurisdictional amount, save the general allegation as to jurisdictional amount.

That allegation was put in issue by defendant's answer and the record discloses neither finding nor evidence to sustain it.

In holding that the plaintiff has the responsibility of pleading and proving the facts necessary to give the District Court jurisdiction the Supreme Court said:

> "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the Court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by the mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not challenged the court may still insist that jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."

Walker Bank having failed to prove any present or future damage by reason of the operation of defendant's branch and the allegations of the complaint as to jurisdictional amount

having been denied by the defendants, the conclusion of this case should be as stated by the Supreme Court:

> "Here the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegations of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed on that ground."

C. The Plaintiff Failed to Prove Facts Showing that the District Court had Jurisdiction.

The defendant has stated in both the District Court and in the Court of Appeals (Tenth Circuit) that Walker Bank has not been and will not be damaged by the operation of the defendant's branch in Logan. This statement has never been challenged by Walker Bank. Defendant bank does not believe in view of the foregoing authorities that it had the burden of showing that no damage has been or will be suffered by Walker Bank. However, the defendant in order to avoid a ruling that the law requires such showing presented evidence that defendant's branch benefits Walker Bank. The stipulated facts do not show that The First National Bank's drive-in branch will cause any damage to plaintiff Walker Bank. The stipulated facts do show that The First National Bank's branch may be a benefit to Walker Bank in the event of a National Emergency and that it is a present benefit to Walker Bank because it relieves Walker Bank from the necessity of storing additional currency in the event of a National Emergency.

As has been stated Walker Bank is an affiliate of one of the largest chain banking systems in the Western United States with assets in excess of $6,000,000,000. The Logan branch of Walker Bank, located in the center of the city's business district at 102 North Main Street, has established a drive-in

teller's window at 35 East 1st North, separated from its main banking office by a right of way.* The First Security Bank of Utah, Logan branch, has a similar window.

Physical circumstances makes it impossible for The First National Bank to provide a drive-in window for its patrons separated only by a right of way. [In fact such a window may be a branch under the definition in the Federal statute. See Jackson v. First National Bank of Valdosta (D. C. Georgia) 246 Fed. Supp. 134.] Since an additional office for receiving deposits or paying checks or making loans is a branch under Federal law [see 12 U. S. C. Section 36 (f)], The First National Bank sought and obtained approval to establish a branch bank consisting of a drive-in window for such purposes three blocks away from its main office for the convenience of its customers. Such drive-in service for its own customers, established in order to compete with the drive-in service of the two largest banking chains in Utah, obviously is not causing either bank any damage. (All the banks, branches and additional drive-in offices in Logan are located within a five block portion of the eight block Main Street business section.) The mere allegation that a small town bank's drive-in window could possibly injure the giant banking chain of which Walker Bank is a part is almost too absurd for further discussion.

The fact remains, however, that the plaintiff, Walker Bank, presented no evidence to the District Court that it was dam-

*After this action was commenced The First National Bank challenged the establishment of the drive-in window on the grounds that it was a branch in the state courts. The District Court for Cache County, Utah, held that since it was connected by a pneumatic tube it was not a branch. The case is presently pending in the Utah Supreme Court, No. 10621. Even if the Supreme Court should reverse the lower court, Walker Bank still has sufficient space surrounding their branch bank in Logan to remodel and establish a drive-in window as a part of their main branch banking office.

aged. The First National Bank presented evidence of a benefit. The complaint of Walker Bank was therefore properly dismissed and the decision of the District Court can be sustained on grounds of lack of jurisdiction.

If the Court does not agree with the defendant bank's position, it is respectfully requested that the Court indicate the basis on which the Court finds that Walker Bank has been or will be damaged by defendant's branch so that the defendant can present facts which controvert such conclusion in the District Court.

If the Court agrees with defendant's position, it is respectfully requested that the Court affirm the decision of the District Court to dismiss the plaintiff's complaint and reverse the decision of the Court of Appeals (Tenth Circuit) on the grounds that the basis for the District Court's jurisdiction has not been established by the plaintiff.

Point II.

THE PLAIN LANGUAGE OF 12 U. S. C. SEC. 36 (c) (1) AUTHORIZES THE COMPTROLLER OF THE CURRENCY TO PERMIT THE FIRST NATIONAL BANK TO ESTABLISH A BRANCH IN LOGAN, UTAH.

A. Actions of the Comptroller of the Currency are Subject to State Restrictions only to the Extent Congress has Stipulated.

The issue in this case is not precisely the same as that presented in First Security Bank of Utah, N. A. v. Commercial Security Bank, No. 1009 and Saxon v. Commercial Security Bank, No. 1126, consolidated herewith, as in these cases it is possible for The First Security Bank of Utah to comply with the requirements of Utah State law. The precise issue here is whether Congress intended that the State of Utah could

impose conditions upon branch banking which permit branching in Logan by state banks, but which conditions are impossible for the national bank to meet if it desires to branch within its own city of Logan.

The Court of Appeals (Tenth Circuit) said that because the Utah State Supreme Court held in Walker Bank v. Taylor, 15 U. 2d 234, 390 P. 2d 592 (1964), that under Section 7-3-6, Utah Code Annotated, 1953, the State Bank Commissioner could not authorize a state bank to establish a branch within the limits of the city of Provo, Utah, where it is located because of its own location as a unit bank in that city and the absence of other unit banks (as distinguished from branches) which it could take over, the Comptroller is also prohibited from authorizing a national bank to branch in a similar situation under 12 U. S. C. Sec. 36 (c) in Logan, Utah.

However, the actions of the Comptroller of the Currency are subject to state restrictions only when, and only to the extent that Congress has stipulated. Mercantile National Bank v. C. H. Langdeau, (1963) 371 U. S. 555, 83 S. Ct. 520, 9 L. ed. 2d 523; Van Reed v. Peoples' Nat. Bank of Lebanon, (1905) 198 U. S. 554, 557, 25 S. Ct. 775, 49 L. ed. 1161; and Davis v. Elmira Savings Bank (1896) 161 U. S. 275, 16 S. Ct. 502, 40 L. ed. 700. National Banks are organized as a discrete system and as such are immune from state control except insofar as Congress permits. Farmers & Mechanics National Bank v. Dearing, 91 U. S. 29, 23 L ed. 196; McCullough v. State of Maryland, 4 Wheat 316, 17 U. S. 316, 4 L. ed. 579. Plainly no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. First National Bank of California, 262 U. S. 366, 43 S. Ct. 602, 67 L. ed 1030. See also Franklin National Bank v. New York (1954) 347 U. S. 373, 74 S. Ct. 550, 98 L. ed. 767 and the annotation in 98 L. ed. at pages 775-784.

B. The First National Bank has Complied with the Requirements of the Federal Statute.

The applicable section of the Federal statute in question here reads in part as follows:

> "12 U. S. C. Section 36 (c): A national banking association may with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;"

Therefore, the requisites for the establishment of a branch bank by a national bank where both are located within the limits of the city where the main office of the parent bank is located as follows:

1. Approval of the Comptroller of the Currency. This was obtained by The First National Bank on January 17, 1963, and Certificate of Authority No. 6983A was issued on January 21, 1963 (R. 13).

2. Establishment and operation of branch banks must be expressly authorized to state banks by the law of the state. The second paragraph of Section 7-3-6, Utah Code Annotated, 1953, expressly authorizes state banks in Utah to establish branch banks:

> "With the consent of the bank commissioner any bank having a paid in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus)" (R. 41).

Paragraph 5 of the Stipulation of Facts and Other Matters (R. 12) and paragraphs 2 and 4 of plaintiff's complaint (R. 3)

admit that state banks are expressly authorized to establish branches in Logan, Utah, as Walker Bank has established a branch in Logan under the state statute.

Since both requirements of 12 U. S. C. Section 36 (c) (1) have been met in the establishment and approval of a branch bank in Logan, Utah, by The First National Bank of Logan, plaintiff's complaint was correctly dismissed by the District Court. Imposing any other requirement on The First National Bank of Logan, or reading the statute in any other manner is contrary to the generally accepted rule as stated in 50 Am. Jur. Statutes, section 227:

> "The only mode in which the will of a legislature is spoken, is in the statute itself . . The Courts may not speculate as to the probable intent of the legislature apart from the words."

It is respectfully submitted that the Court of Appeals (Tenth Circuit) disregarded this rule in finding that Congress intended that the Comptroller of the Currency should "look at all the State law on branch banking and not just a part of it" (R. 56), and that he must find that "the branch is authorized in all respects by the law of the State in which the bank is located" (R. 51) before he can issue his certificate of approval. In other words that in enacting subdivision (1) Congress intended that national banks are subject to the identical restrictions as state banks in seeking authority to branch within the limits of the city, town, or village where they are located.

But the words of the Federal statute do not provide that a national bank must comply with all the requirements of state law before it can establish branches within the limits of the city where it is located. Imposing such conditions on national banks requires them to comply with additional restrictions of state law as well as the provisions required by Federal law and

the Comptroller's rules which are not imposed on state banks and consequently gives state banks a "substantial competitive advantage" (R. 56).

For example, if all the requirements of state law are imposed on national banks, the national bank must also get approval of the State bank commissioner before it can branch. (See sixth paragraph of Section 7-3-6, Utah Code Annotated, 1953). National banks would therefore be required to comply with regulations of two administrative bodies instead of the one required by state banks.

If Congress intended identical requirements to govern both state and national banks, why did Congress provide in 12 U. S. C. Section 36 (d) and 12 U. S. C. Section 51, that a national bank must have a paid in capital and surplus of $240,000 before it can branch within the city where it is located, even though a state bank can branch with a paid in capital and surplus of one-fourth this amount under the second paragraph of Section 7-3-6, Utah Code Annotated, 1953.

If Congress intended that identical requirements of State law are applicable to national banks establishing branches within the limits of the city, town, or village where they are located, why did Congress provide in 12 U. S. C. Section 36 (c) (2) that the minimum requirements of capital imposed by state law on banks establishing branches outside the community where they are located are imposed on national banks, without imposing any such requirement on national banks establishing branches inside the city limits where the main office is located. In the original Banking Act of 1933 outside branches, but not inside branches, were limited by certain capital stock requirements, based on pupulation (48 Stat. 190). In 1952 this was changed to make capital stock and surplus requirements for outside branches the same as the less stringent

state law requirements for establishing outside branches by state banks (Act of July 15, 1952, 66 Stat. 633 H. Rept. No. 2423, 82nd Cong., 2nd Sess.) But such identical restrictions of state law were not imposed on national banks seeking to establish branches inside the community where they were located.

In view of the opposition in Congress to branching outside the community (see 67 Cong. Rec. 3248) it seems somewhat incongruous to hold that national banks branching inside their communities are subject to more restrictions than national banks branching outside their communities. In First National Bank of Smithfield, North Carolina, v. Saxon (4th Cir. 1965) 352 F. 2d 267, at 271, the protesting bank contended that the approval of the Comptroller for establishing branches outside the city limits where the main bank was located was "contingent upon his compliance with the inquiries and ascertainments required of the State Commissioner of Banks by the North Carolina statute." But the court said that "We disagree with the argument." In that case the protesting bank was relying upon specific statutory language restricting the Comptroller's authority. There is no restrictive language upon which the protesting bank can rely in subdivision (1) of 12 U. S. C. Section 36 (c). See also the well reasoned opinion of Judge Fox in American Bank & Trust Co. v. Saxon (1965) 248 F. Supp. 324*

The only restrictions imposed by Congress on national banks branching outside their communities are (1) approval

*In this case the court held that once a state had committed itself to the public policy of allowing branch banking, state limitations could not be applied to the Comptroller and his approval alone was required for the establishment and operation of branch banks of the national banking institutions in Michigan. The Court declined to follow the reasoning of the Court of Appeals (Tenth Circuit) saying:

"Had Congress intended precise parity between the two sys-

of the Comptroller of the Currency, (2) statutory authority for branching must be in state law, (3) subject to location requirements of state law, and (4) subject to capital restrictions of state law. But national banks branching within the community where they are located under the decision of the Court of Appeals (Tenth Circuit), must not only show (1) approval of the Comptroller of the Currency and (2) express authority for branching in state law, as provided in 12 U. S. C. Section 36 (c) (1), but they must also show compliance with all provisions of state law, including:

(a) Compliance with capital and surplus requirements of 12 U. S. C. Section 51 or such greater requirements as may be imposed by state law (even though Congress did not write language in the statute so providing).

(b) Compliance with state procedures or methods of branching such as taking over an existing unit bank (even though Congress did not write language in the statute so providing).

(c) Compliance with findings of State Bank Commissioner as to public convenience and necessity (even though Congress did not write language in the statute so providing), even though such findings differ from those of the Comptroller of the Currency.

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tems it could have provided by plain language to that effect. Such language is conspicuously absent in the statute."

The court also noted that the act was passed during the depression at the height of the banking crisis (three days after President Roosevelt had declared a National Bank Holiday) and said:

"To now urge that a statute should be construed in favor of the interests which opposed its passage, even at a time when the aim of the President was to conserve the system within which banks operated, and to strengthen them against future crises, is to blindly ignore the history of both our country and this legislation."

(d) Approval of the State Bank Commissioner (even though Congress did not write language in the statute so providing).

(e) Showing public convenience and advantage at a public hearing conducted by the State Bank Commissioner (even though Congress did not write language in the statute so providing).

(f) Where there is no other unit bank which can be taken over in the city where the bank is located, forming an independent unit bank for five years and then taking over the same (even though Congress did not write language in the statute so providing.)

(g) In states such as Indiana containing even more detailed statutory requirements than Utah, the national bank must also show that it has complied with the State Bank Commissioner's restrictions on unavailability of parking facilities (even though Congress did not write language in the statute so providing). (See Acts of 1963, Chap. 350, amending Anno. Stat. (Burns) 18-1707.)

The above list could be multiplied by reference to the details of each state statute. We submit that the foregoing is sufficient to show that the words of 12 U. S. C. Section 36 (c) (1) do not incorporate all the requirements of state law with respect to branching by national banks.

C. The Restrictions in Subdivision (2) of 12 U. S. C. Section 36 (c) are not Incorporated in Subdivision (1).

In the lower court the plaintiff did not contend that all restrictions of state law are incorporated into 12 U. S. C. Section 36 (c) (1), but claimed that the words contained in Subdivision (2) of 12 U. S. C. Section 36 (c) which provide that national banks seeking to establish branches outside the limits of the city where they are located are "subject to the

restrictions as to location imposed by the law of the State on State banks" should also be made applicable to subdivision (1) of the statute pertaining to the establishment of intracity branches (R. 3-4).

The plaintiff then argued for a broadened meaning of the geographical restriction as to location imposed by subdivision (2) to include the limitation as to method or procedure or the economic limitation imposed on state banks in the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953. Plaintiff argued that the location restriction and the broadened interpretation thereof also applied to subdivision (1) of 12 U. S. C. Section 36 (c). (See the last sentence of paragraph 5 of plaintiff's complaint (R. 3-4).

The cases used by plaintiff to support its position refer only to banks seeking to branch outside their communities under 12 U.S.C. Section 36 (c) (2) and hold only that if an outside state bank may at the time establish a branch in the city, town or village where the national bank desires to branch, the national bank may also establish and operate a branch, and if any outside state bank may not at the time establish a branch in that city, town or village, the national bank is similarly restricted because of the location restriction in subdivision (2). In any event, to impose any additional requirement under the provisions of 12 U. S. C. Sec. 36 (c) (1) by attempting to read into such provision a broadened interpretation of the location restrictions on establishment of branches outside the city limits where the bank's main office is located as contained in 12 U. S. C. Sec. 36 (c) (2) is contrary to the plain meaning of the words used by Congress, is contrary to the general rule of determining the intent of the legislature above cited, and it also violates the ordinary rules of grammar and of English punctuation with regard to the use of the semicolon. As stated in Webster's New Collegiate Dictionary, 1958 Edition, page 1150:

"A semicolon is used to separate the clauses of a compound sentence: (1) In the absence of any connective. (2) When an antithesis exists between the clauses. (3) When there is a marked change in thought. (4) Where the connective is one of the conjunctive adverbs. (5) When the clauses themselves contain commas."

It is submitted that the only proper interpretation of why Congress used a semicolon at the end of subdivision (1) of 12 U. S. C. Sec. 36 (c) is under (2) above which provides that a semicolon is used "when an antithesis exists between the clauses." There is a connective "and" following the semicolon so it was not used because there was no connective. The entire paragraph is discussing establishment of branch banks so there is no marked change in thought. A conjunctive adverb is not used. And Congress is not using a semicolon because the clauses contain commas because Congress does not use a semicolon prior to the last "and" in the first sentence of 12 U. S. C. Section 36 (c), even though the clauses contain commas, in order that the reader of the statute may clearly understand that the purpose of the only semicolon in the entire first sentence is to show that an antithesis exists between the two main clauses of the compound sentence. In other words, Congress in writing 12 U. S. C. Sec. 36 (c) defined the conditions for establishing branches under two separate circumstances: (1) Within the limits of the city, town or village in which said (national banking) association is situated; and (2) at any point within the state in which said (national banking) association is situated – other than within the limits of the city, town or village in which said association is situated as aforesaid. Any restriction contained in the wording of subdivision (2) of said section 36 (c) (e. g. subject to the restrictions as to location imposed by the law of the state on state banks) refer only to subdivision (2) of the section.

The use of the semicolon by Congress also indicates an intent to follow the general rule of grammatical construction.

In Hopkins v. Hopkins, 287 Mass. 542, 192 N. E. 145, 147, 95 A. L. R. 1286, the Court said:

> "It is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation."

In Kales v. City of Oak Park, 315 Mich. 266, 23 N. W. 2d 658 (1946) the court said in citing the Hopkins v. Hopkins case, supra.:

> "The last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence."

There is nothing in the language of the statute to indicate that Congress intended that the two modifying clauses in 12 U. S. C. Sec. 36 (c) (2) (i. e. "if such establishment . are . . authorized affirmatively . , and subject to the restrictions as to location imposed by the law of the state on state banks") have reference to anything but the clause in subdivision (2) which reads "at any point within the state in which said association is situated."

A reading of 12 U. S. C. Sec. 36 in its entirety lends weight to this interpretation. Whenever Congress intended that a specific method or procedural restriction of state law would apply it so stated. For example:

1. In subsection (b) (1) where a state bank is converted to a national bank "The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a state bank (*in a situation identical to that of a national bank*) resulting from the conversion of a national bank would be prohibited by the law of such state from retaining and operating as a branch *an identically situated office* which was a branch of the national bank immediately prior to conversion."

2. Also in subsection (b) (2) where a national bank is consolidated with another bank "The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a state bank (*in a situation identical to that of the resulting national bank*) resulting from consolidation into a state bank of another bank or banks would be prohibited by the law of such state from retaining and operating as a branch an *identically situated office* which was a branch of the state bank immediately prior to consolidation."

3. In subsection (c) a capital stock limit is imposed by the phrase that "no such association shall establish a branch outside of the city, town or village in which it is situated unless it has a combined capital stock and surplus *equal* to the combined amount of capital stock and surplus, if any, *required by the law of the state* in which such association is situated for the establishment of such branches by state banks." (Italics added.)

Congress has been specific when it desired to impose the methods or procedural restrictions of state laws on national banks. If Congress had intended that establishment of national bank branches, within the city limits where the bank's main office is located, should be under the identical restrictions as are imposed on state banks, Congress would have so stated as it did in other parts of the branch banking statute above referenced.*

*See also specific restrictions of state law imposed by Congress on other banking matters when it desired specific restrictions: Fiduciary powers, (76 Stat. 668, 1962) 12 U. S. C. 92a (a) & (b); interest (48 Stat. 191, 1933) 12 U. S. C. Section 85 and (44 Stat. 1224-25) 12 U. S. C. 371; and Merger (64 Stat. 456, 1950) 12 U. S. C. 214c. But in the important competitive area of capital requirements, Congress virtually ignored state law capital requirements for branches within the city, which strongly indicates that in establishing new banks or new branches within the city where the bank is located, Congress wanted Federal policy to govern and not state policy. (See 12 U. S. C. Sections 36 (d) and 51.)

Point III.

THE DECISION OF THE DISTRICT COURT IS IN ACCORD WITH THE LEGISLATIVE HISTORY OF 12 U. S. C. SECTION 36 (c) (1).

A. The McFadden Act did not Incorporate all provisions of State Law.

As previously indicated it is unnecessary to consider the legislative history of a statute with language as clear as 12 U. S. C. Section 36 (c) (1). However since the Court of Appeals (Tenth Circuit) used legislative language as a basis for imposing additional requirements on the provisions of subdivision (1) a review of national banking legislation seems appropriate.

Following the financial panic of 1907 a number of states, led by California, began to authorize branch banking. By 1927 branch banking was permitted, with minor modifications, in seventeen states. No authority was given to national banks to establish branches, but in 1922, the Comptroller of the Currency ruled that national banks could open additional "teller windows" in their home cities. This device was thwarted by the Supreme Court in First National Bank in St. Louis v. Missouri (1924) 263 U. S. 640, 44 S. Ct. 213, 68 L. ed. 486 which held that such offices were unlawful in states where branching was prohibited by state law. (If branch banking is prohibited by state law in Logan, Utah, defendant finds it difficult to understand, under the language of this case, why Walker Bank objects to The First National Bank's drive-in window located three blocks from the main office, and does not object to the Logan branch of the First Security Bank of Utah having a similiar drive-in window about one block from its main branch office; or why it is legal for a state bank, Walker Bank, to have a branch bank located at 102 North

Main Street in Logan, Utah, and an additional office located at 35 East 1st North, Logan, Utah, consisting of a drive-in teller window for receiving deposits and paying checks, but illegal for The First National Bank to have a similar office two and one-half blocks further away from its main office.)

The ruling caused the advocates of branch banking to initiate legislation in Congress to permit branch banking by national banks. The bill was opposed by those who feared giant banking monopolies, and Representative Cannon's statement is typical of their arguments:

> "The principle of branch banking when allowed to develop unhampered establishes a monopoly. It creates a gigantic banking octopus, with branches extending like tentacles from the larger cities out to the small towns, throttling local banks and sucking out of the country and into the city the deposits and resources which should be available for local enterprises . . .
>
> "There can be no comparison of the relative merits of the branch bank and the home-owned bank in their influence upon a community and its prosperity. The home bank, owned by local businessmen, has at heart the interest of the town and seeks to build up the community and contribute to its prosperity. The branch bank is owned by outsiders, who have no pride in local affairs and who seek only profits and dividends. The home bank pays its taxes at home and contributes to home institutions and enterprises and its stockholders spend their earnings at home. The branch bank pays the bulk of its taxes in other States and municipalities. It makes little or no contribution for local purposes, and its dividends are drawn from the town in which they are made and spent in distant cities. The home bank is controlled and managed by local boards of directors, the purest form of local self-government, while the branch banks are controlled by professional financiers, with little understanding and less sympathy for the needs and problems of their customers, and is, in short, a species

of carpetbag government. The home bank means home control, independent and cooperative. The branch bank typifies the overlordship of great money monopolies centered in alien territory, to which the patrons of every branch bank pay tribute as truly as the countrymen of the Nazarene paid tribute to Caesar in the golden age of the Roman Empire." (67 Cong. Rec. 3248.)

The proponents of branch banking followed the reasoning of the Comptroller of the Currency, H. M. Dawes, in his testimony before the House Banking and Currency Committee in seeking for approval of the bill:

"At the outset it should be stated that while the question of extending outside facilities in the form of offices or branches beyond the limits of the parent institution but confined to municipal limits is one that might be properly controversial, it does not, to my mind, involve the fundamental principal of branch banking. So long as such an operation is confined strictly to municipal limits, it remains in its essence a community operation conducted for the benefit of residents by residents.

"I will not discuss the necessity or develop the arguments which have induced State legislatures to permit this form of operation. It seems to me it is sufficient to say that these intracity activities do not run parallel at all to the operations which are involved in the extension of banking influence by direct control in the form of branches covering a whole State or limits beyond the municipality. If the principle of local control over banking facilities within city limits is recognized and such an operation is forbidden in one and permitted in another State, it would not be a real concession to any branch banking principle, since intracity banking is, after all, community banking as distinguished from state, district or national banking." (65 Cong. Rec. 11297.)

By such arguments the advocates of branch banking legislation were able to convince the opponents of branch banking

that authorization to national banks to branch within the limits of the city where the association is situated if the state law permits branching by state banks did not involve the branch banking monopoly problem with which they were concerned and the authorization was only to permit the national bank to meet competition from state banks. The compromise measure known as the McFadden Act was adopted (Act of February 25, 1927, c. 191 Sec. 4, 44 Stat. 1228). This measure contained virtually the same provisions as now appear in subdivision(1) of 12 U. S. C. Section 36 (c) except at that time a further provision limiting such branches to cities having a population in excess of 25,000 was included which has since been deleted (but which shows that Congress was not thinking about imposing identical restrictions of state laws, but was prescribing its own restrictions on branching regardless of state law so long as the state permitted branch banking). There is nothing in the legislative history of the McFadden Act that would indicate that Congress intended that any procedural restrictions of state branch banking laws were to be applicable to national banks desiring to branch within city limits where they were situated, since Congress considered intra-city branches as community banking and not branch banking. [The statute passed in order to permit national banks to compete with state banks, but Walker Bank, a giant state bank, argues and, if the decision of the Court of Appeals (Tenth Circuit) is affirmed, will use the statute to throttle the competition of the local First National Bank.]

The Court of Appeals (Tenth Circuit) uses three statements from legislative history of the McFadden Act to support its position that Congress intended all restrictions of State law to be included in the McFadden Act:

a. "Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have

been operating within recent years," [(H. Rept. No. 83, 69th Cong. 1st Sess. 1926 (R. 52).]

There is nothing in this statement that says national banks are subject to the identical restrictions as state banks, but this statement only implies that the new powers given to national banks have been derived from the experience of various states.

b. "This section recognizes the right of national banks to establish branches within those cities in which state banks have that privilege . . " (Ibid).

Do state banks have the privilege to branch in Logan, Utah? Walker Bank and The First Security Bank of Utah have branches in Logan (and can still branch in Logan at this time by taking over The First National Bank) so it cannot be denied that state banks have the privilege to branch in Logan, Utah.

c. "The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks." (Ibid.)

Does the decision of the District Court or that of the Court of Appeals put The First National Bank "more nearly on a par" with Walker Bank? Under the decision of the District Court the two banks have the following rights:

a. First National Bank:

(1) Right to continue to operate drive-in window branch to receive deposits and pay checks.

(2) Power to establish another branch if it raises an additional $100,000 in capital (12 U. S. C. Sections 36 (d) and 51), and obtains approval of Comptroller of Currency as to necessity, effect on existing competitive situation and availability of management and resources.

(3) No power to take over branch of Walker Bank or First Security Bank and eliminate some competition in Logan because of 12 U. S. C. Sec. 36 (b).

b. Walker Bank:

(1) Right to continue to operate its additional drive-in office at 35 E. 1st No. to receive deposits and pay checks.

(2) Power to establish another branch if its stockholders raise $32,000 in additional capital and establish a new bank which can be taken over as a branch in five years (Sections 7-3-10 and 7-3-6, Utah Code Annotated, 1953) and obtains approval of State Bank Commissioner as to necessity and public convenience.

(3) Power to take over The First National Bank of Logan and eliminate some competition in Logan, and after such take over it would, of course, have unlimited power to branch in Logan.

The higher capital requirements in order to establish a new branch, and the lack of any right to take over competitor branches still leaves The First National Bank of Logan at some competitive disadvantage with Walker Bank which is only partially off set by the five year advantage in not being required to establish a new independent bank which can later be acquired as a branch.

Under the decision of the Court of Appeals (Tenth Circuit) the two banks have the following rights:

a. First National Bank:

(1) No right to continue to operate a drive-in window for the convenience of its customers to receive

deposits and pay checks, even though the branches of competitor banks in Logan have that privilege.

(2) Power to establish a drive-in window only if:

(i) It raises $100,000 in additional capital and organizes an independent bank to be taken over in five years.

(ii) At the end of five years it obtains the approval of the State Bank Commissioner to take over the independent bank and operate as a branch.

(iii) It satisfies the State Bank Commissioner as to public convenience and necessity.

(iv) It also obtains the approval of the Comptroller of the Currency and satisfies the requirements of the National Bank Examiner as to necessity, effect on existing competition (which may be impossible to do because such take over cannot help but reduce competition and thus will be contrary to the policy of the Federal Government), and availability of management and resources (which obviously will be extremely difficult for a small unit bank to obtain because it is not large enough to train future managers for banks with an uncertain future.)

(3) No power to take over branch of Walker Bank or of First Security Bank and eliminate some competition in Logan because of 12 U. S. C. Sec. 36 (b).

b. Walker Bank has the same rights under the decision of either court.

It should be obvious that under the decision of the Court of Appeals (Tenth Circuit) the various requirements of state and national law are now so numerous as to make it almost

impossible for The First National Bank to acquire a drive-in office in order to compete with the branches of other banks in Logan. For while The First National Bank was trying to obtain approval of the Comptroller of the Currency to take over the independent bank its stockholders had nursed along for five years in the hope it would some day be a branch, a state bank could move in and make such an attractive offer the stockholders could not refuse and State Bank Commissioner approval to a state bank would come more readily than approval of both the State Bank Commissioner and the Comptroller of the Currency could be obtained by the national bank. Indeed, the anti-monopoly policy of the Congress and the Comptroller of the Currency may make it impossible to take over such bank because it would reduce competition in Logan. The state bank would not be restricted because the Utah statute expressly permits reduction of competition by mergers and take-over of existing unit banks.

So far as The First National Bank of Logan is concerned, the decision of the Court of Appeals (Tenth Circuit) so encumbers the provisions of the McFadden Act as to make them worthless.

B. The Glass Bill did not Change the Requirements of the McFadden Act respecting Branching Inside the City Where the Main Bank is Located.

The banking crisis of the early thirties prompted the introduction by the Banking and Currency Committee of the Senate of legislation commonly known as the Glass Bill. This bill proposed to amend the McFadden Act so as to authorize national banks to establish state wide branch banking without regard to whether state law permitted branch banking (75 Cong. Rec. 9711 and 9890).

Senator Vandenburg offered the first amendment to the bill which provided:

"Except in a city, town or village where there is no National or State bank regularly transacting customary banking business, no such association shall establish a branch except by taking over a unit bank existing at the time of the enactment hereof or an affiliate of such association" (76 Cong. Rec. p. 2206).

Senator Bratton then proposed another amendment, which when perfected provided:

"(c) A national banking association, may, with the approval of the Comptroller of the Currency, establish and operate new branches within the state in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town or village in which it is situated unless it has a paid in and unimpaired capital stock of not less than $500,000.) (76 Cong. Rec. p. 2205.)

The Bratton amendment was passed with 52 votes for and 17 against with 27 not voting. (76 Cong. Rec. 2208.) Mr. Vandenburg then withdrew his amendment with the comment that "with the geographical limitation in place the other limitation would be inappropriate." (76 Cong. Rec. 2208.) The bill as amended passed the Senate and the 72nd Congress came to an end without action upon the bill by the House of Representatives. During the special session of the 73rd Congress separate banking bills were passed in the House and the Senate. The House bill still contained no provisions for an extension of branch banking. The Senate bill contained the identical provisions which the Senate had previously approved including the Bratton amendment set forth above. (77 Cong. Rec. 3726.)

The Conference Committee reported back its completed bill, the applicable portions which are at issue here being

identical with the present law. (77 Cong. Rec. 5781.) This was enacted into law.

It seems clear that the failure of Congress to incorporate Senator Vandenburg's amendment or a modified version thereof (such as restricting its application to states with similiar requirements) requires a rejection of Walker Bank's theory that Congress intended to impose additional procedural requirements on branch banking by national banks within city limits other than approval of the Comptroller in states expressly authorizing branch banking. It also seems clear that the Conference Committee's action in rejecting Senator Bratton's amendment in the form originally approved by the Senate and retaining the McFadden Act as passed in 1927 as subdivision (1) of 12 U. S. C. Section 36 (c) and then adding a new subdivision (2) authorizing national banks to branch outside the limits of the city where they are situated, subject to additional restrictions (e. g. restrictions as to location and capital requirements) not imposed by the McFadden Act on intracity branches, supports the decision of the District Court (R. 41-42) that the restrictions of subdivision (2) are not applicable to subdivision (1) of 12 U. S. C. Section 36 (c). In leaving the McFadden Act unchanged Congress reaffirmed its position (with regard to intracity branches) that if state law expressly authorizes branch banking a national bank may branch within the limits of the city where it is situated subject only to the Comptroller's approval and without being subject to any other restriction that may be imposed on state banks by state law. As stated by the court in Rushton v. Michigan National Bank, 298 Mich. 417, 299 N. W. 129 (1941):

> "(The state) having made the competition possible, national banks as corporate instrumentalities of the United States created for public purposes need look only to the terms of the National Bank Act for guidance and approval of their actions."

C. The Federal Branch Banking Act does not Impose Identical Restrictions of State Law on National Banks.

As is clearly indicated in the opinion of the Court of Appeals (Tenth Circuit), Congress wanted national banks to have equal opportunity of competition with state banks. But it is respectfully submitted that it was the purpose of Congress to avoid the situation which the Court said is the law. Congress did not want the small bank to be prohibited from branching in its own city where it was necessary to protect its competitive position if a giant state bank had authority under state law to branch in that city. In view of the strong language used by Representative Cannon, supra., it is extremely difficult to understand how plaintiff can rely upon the McFadden Act [as now incorporated into 12 U. S. C. Section 36 (c) (1)] as authority for prohibiting a small unit bank from branching in its own city in a state where a state bank has already branched in that city and can still lawfully branch in that city by consuming a small unit bank and converting it to another branch owned by outsiders.

It is respectfully submitted that the Court of Appeals (Tenth Circuit) decision is that the principle of equality between state and national banks only applies if it appears that the national bank may under a particular situation have a privilege that a state bank does not have in a similar situation elsewhere. The principle apparently does not apply where the national bank is placed at a competitive disadvantage. Under the decision of the Court of Appeals (Tenth Circuit) all banks in Utah have the power to branch in Logan, but The First National Bank cannot branch in Logan. Under the decision of the Court of Appeals (Tenth Circuit) the branches in Logan of outside banks can improve their efficiency in accepting deposits through their established drive-in facilities, but because of physical circumstances The First National Bank

cannot establish such a facility and thus its efficiency in receiving deposits is impaired by the decision of the Court.

The Court of Appeals (Tenth Circuit) seems to ignore the principle that national banks are federal instrumentalities subject to the paramount law of the United States and state law may not impair their efficiency in acting under such law of the United States. The Court of Appeals (Tenth Circuit) uses legislative history of the McFadden Act in an attempt to show that Congress intended to allow the states to prescribe all the restrictions that are to be imposed on national banks. But the McFadden Act was designed to permit national banks to compete with state banks and was not intended to prevent the national banks from competing and Congress left the matter of whether or not a national bank could branch up to the discretion of the Comptroller of the Currency and did not say that a national bank could branch only if it met all the restrictions of state law or the requirements of the state bank commissioner.

If Congress had intended to impose state locatic requirements on intracity branches, Congress would have so stated. If Congress had intended to adopt the merger limitations, the amendment offered by Senator Vandenburg would have been adopted. If Congress had intended that the same restrictions in subdivision (2) were applicable to subdivision (1) of 12 U. S. C. Section 36 (c), the Congressional Conference Committee would not have changed the Bratton Amendment and made two subdivisions instead of one. If Congress had intended identical restrictions of state law should apply to national banks, Congress would have so stated.

Since Congress has made it clear that all that is required is express authority for branching in state law (such as is contained in the second paragraph of Secion 7-3-6, Utah Code Annotated, 1953) and approval of the Comptroller for intracity branches, then this Court should not permit the so-called

"equality" theory of the Court of Appeals (Tenth Circuit) to amend the plain language used by Congress in writing the statute. As has been stated, the exact equality theory expressed by the Court of Appeals (Tenth Circuit) carried to its logical extreme would require national banks to comply with the procedural requirements of the sixth paragraph of Section 7-3-6, Utah Code Annotated, 1953, which deals with state bank commissioner procedural requirements. If Utah state banks are "expressly prohibited" from branching in cities where a unit bank is located unless they take over such bank, they are also "expressly prohibited" from branching until they show to the satisfaction of the state "Bank Commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch office." If the procedural limitations (and the Utah Supreme Court said in Walker Bank v. Taylor, supra., that the fourth paragraph of Section 7-3-6 dealt with a "method" and was not a substantive requirement) of the fourth paragraph of Section 7-3-6 are incorporated into subdivision (1) of 12 U. S. C. Section 36 (c) by the words "expressly authorized," then it is only logical that the procedural requirements of the sixth paragraph are also included. Such an interpretation eliminates the need for a national bank administrator to determine the public necessity and advantage for new branches. Such an interpretation seems to be a long step in the direction of allowing the state bank commissioners to control all expansion of banking facilities in the United States regardless of the desires of the Executive Department of the United States or the needs of the Federal Government.*

*Even in states allowing unlimited branching the approval of the state bank commissioner is required by statute. So in every state permitting branching, national banks would be required to obtain approval of both the state bank commissioner and the Comptroller of the Currency before they could establish a branch within the limits of their own community under the language used by the Court of Appeals (Tenth Circuit).

It is respectfully submitted that the Court should keep in mind the history of the McFadden Act. It was introduced in Congress because the United States Supreme Court said the Comptroller of the Currency could not permit national banks to have teller windows in their own community if the state law prohibited branch banking. The advocates of the bill wanted to permit national banks to have teller windows in their own community in any state regardless of whether or not the state allowed branching. The compromise measure permitted such teller windows only in those states where the state law allowed branch banking. No other restrictions of state law were proposed or enacted by Congress.

The First National Bank of Logan has established a drive-in tellers window in accordance with the provisions of the Federal statute in a state which permits branch banking. Since Congress imposed no other conditions of state law on the establishment of such teller windows, this Court should not permit the decision of the Court of Appeals (Tenth Circuit) to deny such a teller window to The First National Bank. The First National Bank should be given the opportunity to compete with the outside branch of a state bank which has already established such a tellers window in Logan.

Point IV

THE COURT OF APPEALS (TENTH CIRCUIT) INCORRECTLY CITED DECISIONS INTERPRETING 12 U. S. C. SECTION 36 (c) (2) IN DETERMINING THE COMPTROLLER'S AUTHORITY UNDER 12 U. S. C. SECTION 36 (c) (1).

As previously indicated, Walker Bank attempted to broaden the construction of the location restriction in 12 U. S. C. Section 36 (c) (2) and then contended that this restriction is also applicable to subdivision (1). Not only is

plaintiff's contention erroneous, but the cases cited in support of plaintiff's theory are readily distinguishable from the fact situation here.

In the lower Court plaintiff cited Walker Bank v. Taylor, supra., as authority for prohibiting defendant's branch. But the Court in this case did not consider 12 U. S. C. Section 36 (c) (1), and therefore, the facts are not the same as claimed by plaintiff. Dicta in this case reaffirms defendant's position that branching is permitted by state banks in Utah in cities not of the first class as in Logan, Utah. The Court said:

> "The mere presence of a branch bank in a city of the second class . . would not preclude the Commissioner from authorizing the establishment of a branch by another bank."

It is, therefore, clear that Utah law expressly authorizes branch banking in cities of the second class even though there is already a branch of another bank in that city.*

Plaintiff cited four cases as authority for the position that the Comptroller must follow state law in its entirety in ap-

*The Utah Supreme Court also notes in its opinion that the Utah State Bank Commissioner approved the application of Provo State bank on October 25, 1962. So at the time the Comptroller of the Currency approved The First National Bank's branch application on January 17, 1963, the Utah State Bank Commissioner had said Utah State Law permits state banks to branch within their own community where there is no other unit bank they can take over. If later State court decisions which change the legal interpretation of the State Bank Commissioner also change the rulings of the Comptroller of the Currency in interpreting Federal law, it would seem the Comptroller's office will have serious difficulty in administering National banking law. Suppose Bank A applies for a branch in the city where it is located and the Comptroller approves because the State Bank Commissioner says the establishment of such a branch by State banks is authorized by state law. After the branch is established an application is made by Group B to

proving branches of national banks which were relied on by the Court of Appeals (Tenth Circuit). The first case, National Bank of Detroit v. Wayne Oakland Bank, 252 F. 2d 537 (6th Cir. 1958), cert. denied 358 U. S. 830 (1958) involves an entirely different fact situation. Here a state bank had established an outside branch in Troy, Michigan. The National Bank of Detroit, Michigan, also wanted an outside branch in Troy even though the state law contained what the Court considered to be a location restriction which provided that:

> "No such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation."

Consequently, neither state nor national banks could establish a branch in the city of Troy at the time of the application. The District Court found as a fact based on evidence that:

> "The competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to the Wayne Oakland Bank."

No certificate of authority had been issued by the Comptroller to the National Bank of Detroit and the National Bank of

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establish a new unit bank. The Comptroller disapproves because the new branch of Bank A would be adversely affected. Later the State Supreme Court says the State Bank Commissioner was wrong. Bank A is forced to close its branch that has been serving its customers for a number of years. Group C then asks for permission to establish a new bank. This application is approved because the branch of Bank A has been closed. Group B then brings an action protesting the approval because the Comptroller should have known the State Bank Commissioner's interpretation of the law was incorrect. The Comptroller's burden of regulating national banks and promoting fairness among citizens proceeding under the National Bank Act seems complicated enough without finding that Congress also intended that the Comptroller must be able to predict what state courts may do to the legal interpretations of the State Bank Commissioners.

Detroit had not established a branch in Troy. Plaintiff did not explain how a case involving a requested outside branch under the authority of 12 U. S. C. Section 36 (c) (2), in a city where no state banks could at the time establish branches, where the existing state banks will suffer inestimable damage where no certificate of authority had been issued and where no branch had been established by the national bank is authority for the situation here where the action is governed by 12 U. S. C. Sec. 36 (c) (1), any state bank has a legal right at this time to establish a branch in Logan, Utah, the stipulation of facts does not show that any damage will be suffered by the plaintiff bank, a certificate of authority was issued on January 21, 1963, and a branch bank has been established and operated by the defendant since said date.

All the Court decided in National Bank of Detroit v. Wayne Oakland Bank, supra., is that if a state bank could not establish a branch located in a particular city at the time the national bank desired to branch there, then the national bank was barred by the location restriction in 12 U. S. C. Section 36 (c) (2) from establishing a branch in that city at that time. Since the Court did not find all restrictions of state law were incorporated by the portion of the statute which requires affirmative authorization for branch banking in the statute law of the state, it seems obvious the Court would not have said that national banks have "no greater rights" than state banks if there was no location restriction in the Federal statute.* Since subdivision (1) of 12 U. S. C. Section 36 (c) contains no location restriction, the Courts should not cite cases involving outside branches as authority for imposing additional restrictions on inside branches. It seems unreasonable to suppose that Congress intended inside branching to be subject to

*Judge Fox said the Court of Appeals (Sixth Circuit) did not say that all restrictions of state law are incorporated in 12 U. S. C. Section 36 (c) See American Bank & Trust Co. v. Saxon, supra.

more restrictions than outside branching when it imposed no specific restrictions on inside branching and since Congress recognized that inside branching did not involve the monopoly situation Congress was trying to avoid.

Plaintiff cited Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770 (D. D. C. 1959) aff'd per curiam 108 App. D. C. 37, 278 F. 2d 871 (D. C. Cir. 1960), but this case also involves 12 U. S. C. Section 36 (c) (2) and not 12 U. S. C. Section 36 (c) (1) because it also involves a proposed branch outside the city where the national bank is located, there was also an existing branch of a state bank in the village where the proposed branch was to be located and thus the Michigan law quoted in National Bank of Detroit v. Wayne Oakland Bank, supra., was applicable. In addition no state banks could at the time establish branches in this village (so the location restriction of 12 U. S. C. Section 36 (c) (2) barred the branch), there is a finding that the existing state bank will suffer damage, no certificate of authority had been issued and no branch bank had been established by the national bank. Plaintiff should not be permitted to use this case as authority for the reasons stated in the preceding paragraphs.

Suburban Trust Company v. National Bank of Westfield, 222 F. Supp. 269 (D. C. N. J. 1963), also involved a proposed branch bank in aonther city than the parent bank and the Court said that since state banks were authorized to branch in a city other than where the state bank was located under state law the national bank could also. While plaintiff cited this case in support of its position in the lower court, it seems the holding supports the defendant's position and not the plaintiff's. Here the certificate of authority had been issued and the branch established by the national bank. The state bank had previously obtained approval to branch but was required to obtain a new certificate of authority when its loca-

tion changed, thus giving the national bank priority. The Court dismissed the complaint of the state bank. It seems to follow from this case that defendant First National Bank having established a branch in a city where branch banking by state banks is authorized, under a valid certificate of authority, it is also entitled to have plaintiff's complaint dismissed.

The plaintiff would have this Court affirm the decision in the cases consolidated herewith for argument (First Security Bank of Utah, N. A. v. Commercial Security Bank, No. 1009; Saxon v. Commercial Security Bank, No. 1126; October Term 1965). As is evident from the record in those cases, the facts are different. In that case the plaintiff, Commercial Security Bank, and the First Security Bank of Utah, both had a principal office and one branch in Ogden and there were two other independent unit state banks. On June 25, 1963, The First Security Bank applied for authority to establish a branch and before the Comptroller approved the application or issued his certificate of authority the Commercial Bank brought action and asked for a temporary restraining order. The uncontroverted affidavit of plaintiff's president was that if First Security Bank was allowed an additional branch the plaintiff would be damaged about $50,000 and would have no adequate remedy at law. The Comptroller did not issue a certificate of authority.

In the opinon of the District Court (236 F. Supp. 457) the procedural limitation of the fourth paragraph of Section 7-3-6, Utah Code Annotated, 1953, was incorporated into subdivision (1) of 12 U. S. C. Section 36 (c). The Court relied on the case of Commercial State Bank of Roseville v. Gidney, supra., which involved subdivision (2) as the proposed branch was outside the city where the main bank was located. The Court recognized that different language is used in subdivision (1) as compared to subdivision (2) of 12 U. S. C. Section (c), but made no explanation as to why Congress used different

language or why Congress wrote two subdivisions of the statute if the same restrictions of state law are applicable to both subdivisions.* The Court also ignored the purpose of the McFadden Act which was to provide for the perpetuation of the national (not the state) banking system in that the Court did not recognize that its holding if applied to The First National Bank seriously jeopardizes its competitive life. (Under the Court's interpretation, the McFadden Act, although passed for the benefit of the national banks, actually places The First National Bank in a competitive unequal position as it is the only bank in the State of Utah without power to branch in its own community.) The Court also failed to give consideration to the case of State of South Dakota v. National Bank of South Dakota, 219 F. Supp. 842 (affirmed on other grounds, 335 F. 2d 444 (C. C. A. 8th), cert. den. 85 S. Ct. 667, 379 U. S. 970, 13 L. ed. 2d 562), which held that it is possible in some instances under the more restrictive language of subdivision (2) for a national bank to branch in a situation where a state bank cannot notwithstanding the location restrictions of subdivision (2). This case was also cited by the Court of Appeals (Tenth Circuit) in support of its position even though the holding of the case is in support of the defendant's position and not the plaintiff's. The Court here held that the Comptroller is not subject to state procedural rules as the Court denied an injunction to enjoin establishment of branches outside the city where the national bank was located because the

*The Court made no attempt to answer the arguments by the District Court of Utah that there is a presumption that "Congress did not intend the provisions of subdivision (1) to be superfluous" citing 2 Sutherland Statutory Construction, 3rd, Sec. 4705, p. 339 (1943). (R. 41-42.) See also Jarecki v. G. D. Searle Co., 367 U. S. 303, 81 S. Ct. 1579, 6 L. ed. 2d 859 and United States v. Menasche 348 U. S. 528, 75 S. Ct. 513, 99 L. ed. 615, in which the Supreme Court said that Courts should read a statute so as to give effect to every word and every clause and ought not adopt a reading which makes part of a statute redundant.

state procedural rules were not applicable to the Comptroller of the Currency.

In the cases dealing with the establishment of branches outside the city where the main office is located the Courts have used language stating that Congress intended the same standards to apply to both national and state banks. The reason for this language is understandable because Congress specifically provided that with regard to location restrictions on outside branches the same requirements should apply [see subdivision (2) 12 U. S. C. Section 36 (c) which states "subject to the restrictions as to location imposed by the law of the state on state banks."] When the reason for the language used by the Courts is understood, there appears to be no basis for extending such language to situations involving branches within the same city covered by subdivision (1) of 12 U. S. C. Section 36 (c). Since Congress did not incorporate the restrictions as to location into subdivision (1), there is no basis for using the language of the Courts dealing with subdivision (2) as authority for the position that national banks seeking to establish a branch inside the community where they are located are subject to the location restrictions of state law. At least three courts in addition to the District Court of Utah hav recognized that other than the specified restrictions as to location and capital requirements state procedural rules were not incorporated into subdivision (2) of 12 U. S. C. Section 36 (c) (First National Bank of Smithfield, North Carolina v. Saxon, South Dakota v. National Bank of South Dakota, and American Bank & Trust Co. v. Saxon, supra). Since the language of subdivision (1) of 12 U. S. C. Section 36 (c) is less restrictive than the language of subdivision (2) ("express authority" for branching in state law is all that is required as compared to statute law of the state specifically authorizing branch banks and subject to location and capital restrictions of state law), subdivision (1) should not be construed as incorporating more

restrictive procedural requirements of state law into Federal law than are incorporated into the more restrictive subdivision (2).

CONCLUSION

It is respectfully submitted that based on the foregoing the decision of the Court of Appeals (Tenth Circuit) in the case of Walker Bank & Trust Company, a corporation v. James J. Saxon Comptroller of the Currency; and The First National Bank of Logan, of Logan, Utah, a National banking association, 352 F. 2d 90, should be reversed and the Court should be directed to affirm the decision of the United States District Court for the Northern District of Utah (234 F. Supp. 74) dismissing the plaintiff's complaint on one of two grounds:

1. The United States District Court lacked jurisdiction to hear the case because the plaintiff failed to present proof that it had been or would be damaged by the operation of defendant's branch and therefore the amount in controversy did not exceed $10,000, where such allegation was denied by the defendants in their pleadings.

Or in the event the Supreme Court finds jurisdiction, then

2. The Comptroller of the Currency has authority to permit a National bank to establish a branch within the limits of the city where it is located where the state law expressly authorizes state banks to branch in that city at the time and without requiring the national bank to comply with restrictions of the state law applicable to state banks especially where it is impossible for the national bank to comply with such restrictions.

Respectfully submitted,

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